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Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term 1974

STATE OF NEW JERSEY,

Respondent,

vs.

FRED CAPPADONA,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

SEYMOUR GELZER
IARIA AND GELZER
Attorneys for Petitioner
577 Cranbury Road
East Brunswick, New Jersey 08816
(201) 254-0050

HARVEY LEVINE
On the Brief

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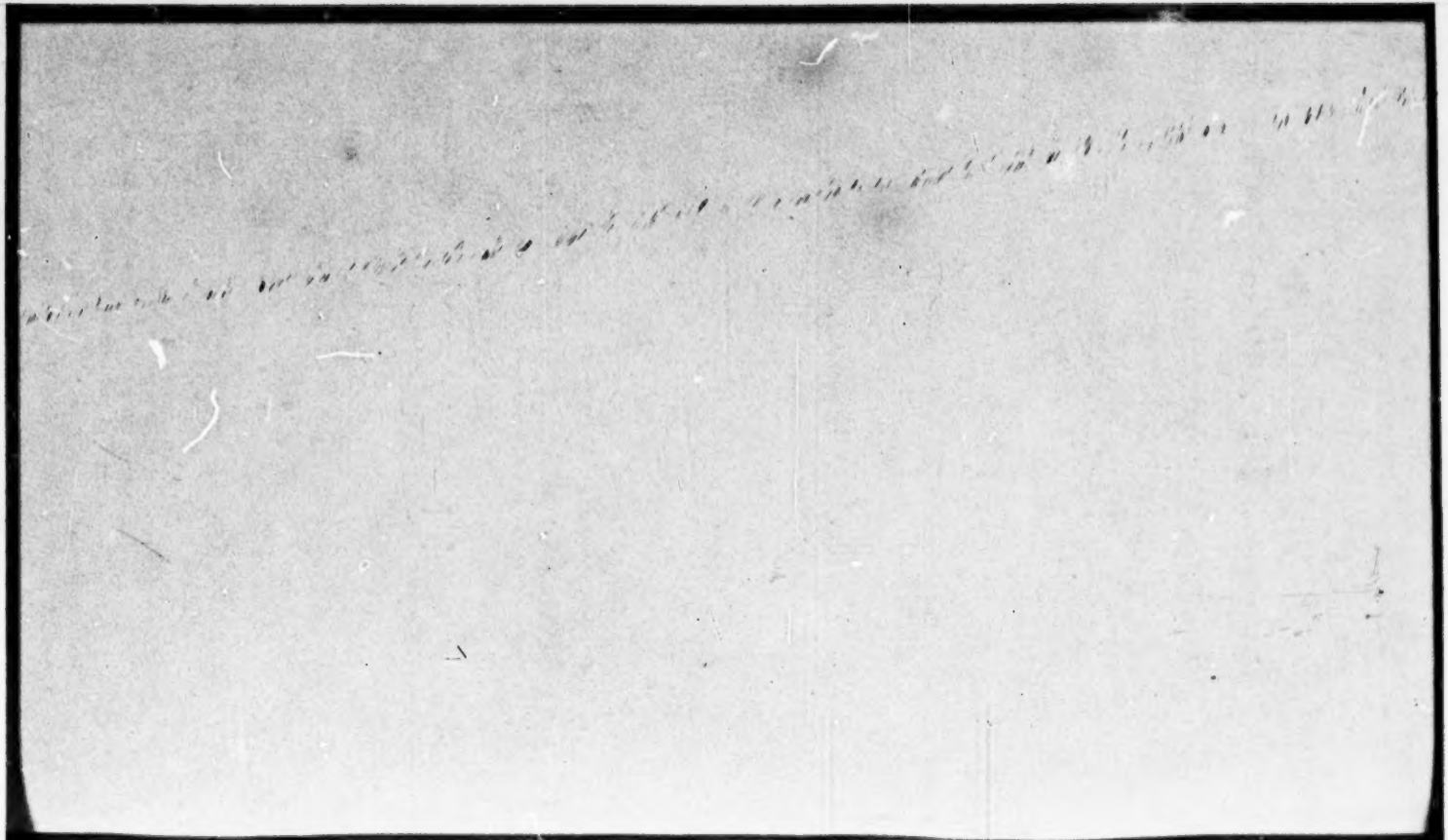

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In The

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October Term 1974

STATE OF NEW JERSEY,

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vs.

FRED CAPPADONA,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of the defendant Fred Cappadona respectfully shows to Your Honors:

STATEMENT OF PROCEDURAL HISTORY

Defendant, Fred Cappadona, was convicted by a jury on May 3, 1972 of the charge of armed robbery and was thereafter sentenced to an aggregate term in the New Jersey State Prison of not less than three years nor more than five years.

On March 5, 1974, the Superior Court of New Jersey, Appellate Division, in a reported decision — 127 N.J. Super. 555 (App. Div. 1974) 318 A.2d 425 — copy of which is annexed hereto (1a), affirmed his conviction and sentence. On May 3, 1974, the Appellate Division modified said opinion, which modification had the effect of adding the name of the Assistant Prosecutor appearing on behalf of the State and deleting that portion of the opinion dealing with the issues raised by defendant Cappadona. The decision reported is that of the modified opinion, but annexed hereto (1a-13a) is the full opinion of the Court as originally filed and dated March 5, 1974.

Thereafter, upon petitioner's seeking a rehearing before the Appellate Division, a supplemental opinion was filed by the Court on April 8, 1974, copy of which is annexed (14a).

On April 22, 1974 a petition for certification to the New Jersey Supreme Court was filed and on July 22, 1974 said petition was denied (17a).

It is from the denial of that petition for certification that the present petition for certiorari is made.

On September 23, 1974, the Middlesex County Court, pursuant to a motion made by defendant herein, reduced the

sentence to 18 months, which sentence is to be served in the Middlesex County Workhouse. Defendant remains free on bail pending the disposition of the appellate process.

There is presently pending before the New Jersey Superior Court, Appellate Division, an appeal from a denial of a motion for a new trial based on newly discovered evidence.

GROUNDS FOR SEEKING PETITION FOR CERTIORARI

Petitioner respectfully urges that his conviction for armed robbery was a result of the erroneous introduction into evidence of testimony relative to pretrial identification procedures employed by the police agencies, in direct violation of the principles enunciated in the case of *Simmons v. United States,* 390 U.S. 377, 88 S.Ct. 967 (1968).

STATEMENT OF FACT

On May 3, 1972, defendant Fred Cappadona (hereinafter referred to as the defendant or Cappadona), was found guilty following a trial of approximately two weeks in length of having been a participant in an armed robbery of the Great Eastern store in New Brunswick, New Jersey, which robbery occurred on July 24, 1968.

Cappadona's co-defendants, Alex Birnbaum and Charles Fisher, were also found guilty of having participated in said robbery. The robbery in question had involved between 3 and 5 white Caucasian males and between July 24, 1968 and the early part of 1970 remained unsolved.

During the latter part of 1969 and the early part of 1970, Jerome McKinney, having been granted immunity from prosecution by the State authorities, testified before a State Grand Jury and implicated Cappadona, Birnbaum, Fisher, Joan Janiszewski, George Lattimore and Gilbert Seagraves.

Thereafter, on April 15, 1970, Cappadona was charged with having been involved in the robbery and on April 29, 1970 he was indicted by the State Grand Jury.

Trial in this matter commenced on April 17, 1972. At that time, the State's evidence against Cappadona consisted of McKinney's testimony and of the testimony of Charles Stankovitz, a member of the New Brunswick Police Department who testified to having spoken with a man for approximately 2 to 3 minutes outside of the Great Eastern store following the robbery. One of the crucial issues in this case involved the photo identification made by Stankovitz in the early part of 1970, at which time he stated that he was able to identify a photograph of defendant.

By way of defense, Cappadona set forth an absolute alibi supported by testimony of several witnesses, including members of his family as well as friends and business associates. Further reference to this will be made hereafter.

Jerome McKinney, the chief accuser against Cappadona, admitted at the time of trial to having received immunity from prosecution in as many as 30 to 40 armed robberies.

Counsel for the defendant attempted to show, in addition to this, that McKinney had a previous psychiatric history, evidencing a proclivity for blaming innocent persons for his own guilty acts.

It should also be observed at this point that prior to trial, counsel for the defendant had made application to the Court to have McKinney examined by psychiatrists so that expert testimony could be offered to substantiate earlier psychiatric findings. This application was denied by the Court prior to trial.

Patrolman Stankovitz testified that, following the armed robbery, he had a conversation with a man whom he described as being approximately 6 feet tall and, according to his police report, weighed approximately 165 lbs. Stankovitz himself stood approximately 6 feet tall and at the time of the robbery weighed approximately 220-230 lbs. Neither his report nor his testimony referred to any other distinguishing characteristics on either the face or the body of the man he had spoken with. According to his report and his testimony, this man gave Stankovitz a license plate number of a vehicle that had left the Great Eastern parking lot shortly after the robbery. Stankovitz, though, did not request this man's name or address.

The testimony at trial developed the fact that at the time of the robbery, and for many years before and since the robbery, Cappadona weighed well in excess of 200 lbs. and, in fact, very close to 220 lbs., stood approximately 5'10" and had a very visible scar on his cheek. (During the trial, when confronted by the defendant, Stankovitz readily observed this scar, indicating that it was very apparent.) Also, in 1968 and for many years prior thereto, and up to and including the time of trial, Cappadona had very extensive tatoos on his body, including the upper part of his chest and on his arms. Stankovitz testified that the man he had spoken with wore no jacket, but despite this there was no observation of any of these tatoos, nor was there

any testimony on the part of Stankovitz that he had any extraordinary ability to recall faces. Furthermore, the police officer did not look through any mug shots following the robbery nor tell anyone about his conversation with this unknown male other than to include it in his report.

It was not until March 2, 1970 that State Police Detective Cordy exhibited 5 photographs to Stankovitz, one of which was that of Cappadona. During the course of the trial, a hearing was held to determine the validity of the photograph identification procedure. During that hearing, Cordy testified that he selected 5 photographs depicting individuals who had a resemblance to Cappadona. He testified that at the time he showed the photographs to Stankovitz, he indicated to Stankovitz that he had some suspects in the Great Eastern robbery and that he wanted Stankovitz to look at the photographs to see if he could pick anyone out. Cordy testified that Stankovitz picked Cappadona's photograph from among the 5, but at no time did Cordy indicate that Stankovitz knew any of the other individuals in the other 4 photographs. In fact, Stankovitz testified that he did know one of the other individuals — a man by the name of DeBonis, and that he stated this to Cordy.

Thereafter, Cordy was recalled to the stand and he "hedged" on the question of whether Stankovitz had informed him that he knew one of the other individuals, i.e., DeBonis. He stated that he couldn't be certain.

Despite the great time lapse between the robbery and the initial photo identification, and despite the conflict between the description of the man that Stankovitz spoke with as contained

in his report and the actual physical makeup of the defendant, and despite the conflict in stories between Cordy and Stankovitz as to Stankovitz' knowing one of the other men in the photographs, the Court, nevertheless, concluded that there were no improprieties associated with the photo identification procedure nor was there any taint associated with the in-Court identification at the time of trial. Thus, Stankovitz was allowed to testify before the jury as to his identification of the defendant.

In addition to the foregoing, despite McKinney's assertion at trial that Fred Cappadona was one of the involved individuals, it was admitted that initially he had named one Rocco Cappadona, who was a person other than this defendant.

By way of defense, Cappadona, testifying on his own behalf, stated that on the day prior to the robbery, he had purchased a truck from Joy Chevrolet in Toms River, New Jersey, which truck was delivered to him on the day of the robbery. The purpose of purchasing the truck was so as to convert it for use in hauling Christmas trees. Cappadona, his wife and daughter, as well as a next-door neighbor, Mr. Linke, testified to the delivery of the truck on the day of the robbery and the fact that Cappadona and Linke worked the entire day together in removing the body of the truck. Cappadona testified that following the removal of the body of the truck, he left for Canada at approximately 5:30 or 6:00 P.M. (which was the time of the robbery). He introduced documentary proof to show the payment of tolls between his home and Canada and back. Joseph Yelencis, former owner of Joy Chevrolet, testified and produced documentary proof to show the purchase of the truck on July 23, 1968 and its delivery on July 24, 1968.

REASONS FOR GRANTING THE WRIT

The underlying thesis of *Simmons v. United States, supra,* is that in each case involving the question of the validity of a photographic identification, an examination must be made into the facts surrounding not only the happening of the occurrence, i.e., the criminal event, but the circumstances of the showing of the photographs, the statements made or not made at the time of the showing, and the time factor between the criminal event and the showing of the photographs.

We have, at rather great length, set forth above the facts surrounding the pretrial photographic identification as they were developed during the "Wade-Simmons" hearing. In addition to what has been stated, we wish to also point out that of the five photographs shown one of the men depicted wore a so-called "zoot" suit and the photograph itself is dated October 13, 1945. Another photograph was of a man of obvious hispanic background. A third photograph was of an individual that Officer Stankovitz admitted knowing.

Thus, of the five photographs, we are left with two, and of these one was that of the defendant. It must be stressed, though that none of these photographs reflected the description as contained in Officer Stankovitz' report of the man with whom he talked following the robbery.

The permissibility of this photographic array, putting to one side the photographs themselves, was all the more suspect in view of the enormous time span between the armed robbery in July 1968 and the time when Cordy showed them to Stankovitz.

No reported case has been found in which such amazing recall has been demonstrated. Common sense would perhaps explain why.

While trial counsel was never able to establish, clearly, that Cordy and Stankovitz were in collusion as to the photograph identification, the trial judge never expressed any doubt as to the powers of recollection of Officer Stankovitz. This, despite the discrepancies between the description of the man as referred to in Stankovitz's police report and defendant Cappadona's actual appearance.

As a matter of law, defendant's motion to have all reference to that photograph identification stricken, as well as the in-Court identification before the jury, should have been granted. Clearly, there was no independent basis for such in-Court identification based upon a 2 to 3 minute conversation almost four years earlier.

The failure of the trial judge to fully appreciate what this Court was saying in *Simmons, supra,* is best exemplified by the fact that even prior to the completion of the "Wade-Simmons" hearing the trial judge had prepared a written opinion which he read into the record.

The evidence against Cappadona was far from overwhelming. Indeed, the alibi defense was full and complete; as a businessman Cappadona was able to call upon both his own business records as well as those of others to establish his whereabouts at and about the time of the robbery. His only "crime" was that of his friendship with his co-defendants and his fleeting familiarity with McKenney.

CONCLUSION

For the reasons set forth above, your petitioner respectfully seeks review by this Court of his conviction in view, especially of the failure of the trial court to properly and effectively apply the principles enunciated in *Simmons v. United States.*

Respectfully Submitted,

s/ Seymour Gelzer

IARIA AND GELZER
Attorneys for Petitioner

Harvey Levine
Of Counsel

APPENDIX 1 — OPINION OF THE SUPERIOR COURT APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A 3009-71
A 3455-71
(Consolidated)

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

FRED CAPPADONA,

Defendant-Appellant.

(Docket No. A 3009-71)

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CHARLES FISHER,

Defendant-Appellant.

(Docket No. A 3455-71)

Opinion

Argued December 11, 1973; Decided March 5, 1974

Before Judges Kolovsky, Fritz and Crane

On appeal from Superior Court, Law Division, Middlesex County.

Mr. Seymour Gelzer argued the cause for appellant Cappadona (Messrs. Iaria & Gelzer, attorneys).

Mr. Robert A. Coogan, designated counsel, argued the cause for appellant Fisher; Mr. Donald W. Peppler, Jr., on the brief. (Mr. Stanley C. Van Ness, Public Defender, attorney).

The opinion of the court was delivered by CRANE, J.A.D.

Defendants Fred Cappadona and Charles Fisher were found guilty of robbery, in violation of *N.J.S.A.* 2A:141-1, and being armed while committing the robbery, in violation of *N.J.S.A.* 2A:151-5, after a jury trial in the Superior Court of Middlesex County. The indictment returned by the State Grand Jury also named Alex Birnbaum, George Lattimore and Joan Janiszewski as defendants. Joan Janiszewski testified for the State. The State's main witness, however, was Jerome McKenney, a confessed accomplice to the present crimes who avoided prosecution by entering into a bargain with the Attorney General by pleading guilty to other offenses.

Each defendant raises several separate issues. A brief review of the testimony presented is necessary for a proper understanding of the questions raised.

Opinion

Jerome McKenney testified that on July 24, 1968 he, Cappadona and Fisher participated in the armed robbery of the Great Eastern Store in New Brunswick. McKenney, who described himself as a "professional thief," said he had been told by Fisher that at certain times there was between $175,000 and $200,000 in cash in the Great Eastern office. Fisher told him that his information was the result of a "tip" from one of Great Eastern's female employees. As a result of this tip, McKenney, Fisher and McKenney's partner Seagraves (since deceased) planned to perpetrate the robbery on July 24, 1968.

According to McKenney, on July 24 he and Seagraves traveled from Philadelphia to New Brunswick where they met Fisher in the parking lot of a place then called the Golden Torch Room. It was at this time that McKenney and Seagraves first learned that Cappadona and Alex Birnbaum were to participate in the robbery. After much discussion it was settled that McKenney and Seagraves would each retain one-third of the proceeds of the robbery as per the original plan, and Fisher would "take care" of Cappadona and Birnbaum out of his one-third share.

The amended plan for the robbery called for Cappadona to drive the "clean car". McKenney described Cappadona's function as follows:

> "This would be a car used in parking on a lot with a clean registration, owner's cards, insurance cards, owner's card, et cetera, and his sole purpose was to block any police cars that

might come in and try to take off after us, possibly have an accident with them and disable the police car and give us an extra minute or so to enable us to make our getaway."

The plan further anticipated that McKenney, Fisher and Seagraves would enter the store to carry out the robbery. Birnbaum, who was driving the getaway car, was to pick them up at the store-front as they fled and drive past the Cappadona vehicle onto Route 1. The Birnbaum vehicle was then to proceed to the vicinity of a certain hospital where, if all went well, Cappadona would meet them and drive them to the home of George Lattimore.

At about 5:30 p.m. they left the parking lot of the Golden Torch Room and proceeded to the parking lot of the Great Eastern Store which was about five minutes away. They drove two vehicles, Cappadona driving alone in a blue Ford Thunderbird. When they got to the Great Eastern parking lot, Cappadona parked in such a position as to be able to block any police cars which might pursue the getaway car. Birnbaum parked about 30 yards from the store. McKenney, Fisher and Seagraves entered the store and walked to the men's room where they put on disguises. Fisher and Seagraves put on overalls and ski masks while McKenney put on sunglasses and a hat. All three readied their handguns. They then went upstairs to the office where they subdued the Great Eastern employees and took what cash was available.

They fled via the same door they had entered and ran to the getaway car which was still parked in the same place. Birnbaum

drove to the area of the hospital and parked on a side street. They abandoned the vehicle and walked to the hospital parking lot. When Cappadona did not immediately arrive, they hid the money, their disguises and guns in a wooded area behind the hospital and phoned the Lattimore house to request that someone pick them up. After being picked up and taken to Lattimore's house, Seagraves went back to the hospital area and recovered the money which was divided among the participants when he returned to Lattimore's house. McKenney was not sure whether Cappadona was present at the Lattimore house when he arrived or whether Cappadona arrived later. Cappadona told them he was delayed because a policeman had asked him to "explain himself." At about 8 P.M. McKenney called the woman he was living with and had her pick him up to drive him home.

Joan Janiszewski who was indicted as an accessory was called by the State to corroborate a portion of McKenney's testimony. On the night of the robbery she received a phone call and drove to the Brunswick Inn in New Brunswick. There she was met by a man who told her to follow him. They drove to the Lattimore house where she remained for 2 to 2½ hours after which she drove McKenney home.

Detective Charles Stankovitz of the New Brunswick Police Department testified that he had been detailed to the scene of the Great Eastern robbery on July 24, 1968. While conducting his investigation two teenage boys informed him that there was a man who was asking a lot of questions concerning whether anyone got a look at the faces of the robbers. Stankovitz then approached the man who was standing next to a blue Ford Thunderbird parked at the end of the Great Eastern building

closest to Route 1. He stood about two feet away from the man for 2 or 3 minutes. The man appeared to be anxious to leave. About two years later he was asked if he could select this same man from a photographic display. He selected Cappadona's picture as depicting the man he had spoken with at the scene. Stankovitz made an in-court identification of defendant as the man he spoke with at the scene of the robbery.

Cappadona's sole defense was that of alibi. He contended that at the time of the robbery he was in his own backyard taking the body off a truck which he had purchased the day before.

Defendant Cappadona initially argues that it was error to permit Stankovitz to make an in-court identification of defendant as being on the Great Eastern premises shortly after the robbery occurred. The infirmity which Cappadona asserts is that the in-court identification was tainted by an impermissibly suggestive out-of-court photographic identification procedure. The argument is without merit. Stankovitz was shown five pictures. He recognized one of the five as an individual with whom he had previously been in contact. We have examined the record and the remaining four pictures in order to determine "whether the choice made by the witness represents his own independent recollection or whether it in fact resulted from the suggestive words or conduct of a law enforcement officer." *State v. Farrow*, 61 N.J. 434, 451 (1972), cert. den. 410 U.S. 937 (1973). A close examination of the record reveals no evidence of suggestion through word or deed. And, viewed under "the totality of circumstances of the identification," *Id.* at 451, we can glean no impermissible suggestion from the photographs themselves.

Opinion

Detective Cordy who selected and displayed the photographs to Stankovitz testified that he rummaged through about 1,000 photographs before selecting those to be displayed with Cappadona's. Excluding the photograph immediately recognized by Stankovitz, we find the photographs of the other three individuals to be generally similar in appearance to that of Cappadona. Although there are minor differences among each of the photographs as the hypercritical eye of Cappadona observes, we are unable to find that the identification of Cappadona "resulted from the suggestive words or conduct of a law enforcement officer."

Cappadona next argues that a mistrial should have been declared because Detective Cordy deliberately showed the identification photographs, commonly known as mug shots, to the jury. This contention is contrary to the factual finding of the trial judge. On such matters we are constrained to affirm except in the clearest case where there is no doubt about the matter. *Greenfield v. Dusseault,* 60 N.J. Super. 436, 444 (App. Div. 1960), aff'd., o.b., 33 N.J. 78 (1960). See also: *State v. Johnson,* 42 N.J. 146, 161-162 (1964). This is not such a case. The conduct of Detective Cordy giving rise to the objection was within the view of the trial judge. His finding will not be disturbed.

Cappadona next urges that his motion for a new trial should have been granted on the grounds that the verdict was against the weight of the evidence. His argument in this regard is based upon what he regards as an inconsistency in the testimony of two of the State's witnesses, McKenney and Stankovitz. The testimony of McKenney places Cappadona at the Lattimore

house (which is about 15 minutes from the Great Eastern store) at about 6:20 p.m. The testimony of Stankovitz indicated that at about 6:25 p.m. he was speaking with Cappadona on the Great Eastern premises. From this Cappadona reasons that since he couldn't be in two places at the same time, the verdict is against the weight of the evidence.

We find no merit to this argument. The events to which McKenney and Stankovitz testified occurred four years before trial. And, although Stankovitz was testifying from memory as refreshed by a police report, McKenney was testifying solely from memory. Moreover, the record clearly indicates that McKenney was testifying to approximate times. Under these circumstances we find no reason to reverse the trial court's denial of Cappadona's motion for a new trial. *Dolson v. Anastasia,* 55 N.J. 2, 6-9 (1969).

Cappadona next argues that a mistrial should have been declared after the prosecutor's summation because of "improper usage of prior conviction of crime." The objectionable comment came about in the following context:

> " . . . Now the admissibility of this crime is not to show that because he committed one crime he would commit another. Not at all. The important thing to remember, and try to relate this back to the alleged sales certificate, that Mr. Cappadona was convicted of the crime of attempting to obtain money under false pretenses. The whole essence of that crime is one of deceit and lying."

At this point the court interjected on its own initiative and gave curative instructions. We find those instructions sufficient to have overcome any prejudice possibly resulting to Cappadona. See *State v. Driver*, 38 N.J. 255, 292-293 (1962).

In the next point which he raises, Cappadona argues that the judgment of conviction should be reversed because of the State's failure to provide timely discovery pursuant to a discovery order signed on September 18, 1970. The facts show that Cappadona moved for dismissal for failure to provide discovery on February 9, 1972. At the time of argument on February 25, 1972, the State had complied with the discovery order. Unable to show any prejudice, Cappadona's request for dismissal was denied. Approximately two months later, on April 17, the trial began.

We find the period of time between compliance with the discovery order and the onset of trial to have been eminently reasonable for the completion of discovery by Cappadona. If he had been prejudiced by failure to obtain discovery, it is because of his own lack of diligence and not the State's.

Cappadona's final argument contends that the trial judge committed "plain error" in permitting evidence of his prior convictions into evidence. He argues that pursuant to *N.J.S.A.* 2A:164-28, had he moved before trial to expunge the record of his 1960 conviction of the crime of obtaining money under false pretenses, that his request for expungement should have been granted and that the record of that conviction rendered inadmissible in the present prosecution. We see no merit in this

argument. *N.J.S.A.* 2A:164-28 provides for expungement of a criminal conviction after the lapse of 10 years where a suspended sentence or a fine of less then $1,000 has been imposed and no subsequent conviction has been entered, after compliance with the procedure set forth therein. That procedure requires that a copy of the order fixing a date for hearing the matter be served "upon the county prosecutor wherein such court is located, and upon the chief of police or other executive head of the police department of the municipality wherein said offense was committed." The purpose of this provision is to afford law enforcement authorities an opportunity to be heard and "plainly requires such public officials to bring to the attention of the court *all pertinent information* they may have regarding the petitioner and the merits of the petition." *Waterfront Comm. of N.Y. Harbor v. Pasquale,* 65 N.J. Super. 498, 504 (App. Div. 1961) (emphasis added). Cappadona has not complied with the statutory procedure. Thus, there was no error in allowing evidence of Cappadona's past criminal convictions to be introduced in evidence. *State v. Hawthorne,* 49 N.J. 130 (1967).

Defendant Fisher presents four reasons for reversal. He first contends that he has been deprived his right to a speedy trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. The issue was previously presented in a pre-trial motion to dismiss, and denied. Thereafter defendant was granted leave to appeal and this court affirmed the denial of Fisher's motion to dismiss in an unpublished opinion. *State v. Fisher* (A 1967-71, decided April 21, 1972). Subsequently the United States Supreme Court decided *Barker v. Wingo,* 407 U.S. 414 (1972) in which it was held, among other things, that the requirement that a demand for a specified trial

date be made as a prerequisite to a motion to dismiss for failure to accord defendant a speedy trial was inconsistent with due process. In the opinion it was suggested that trial courts consider four factors in determining whether an indictment should be dismissed for delay in prosecution: (1) length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant.

Fisher urges that we re-examine our prior determination in the light of *Barker v. Wingo, supra.* We are convinced that *Barker* should not be applied retrospectively. *See Stovall v. Denno,* 388 U.S. 293, 297 (1967). Nevertheless, even under the standards set forth in *Barker,* denial of the motion to dismiss was not improper. The length of time from filing of the indictment to the time of trial was approximately two years; the reason for the delay was the inability of the prosecutor to produce the essential witness McKenney who was incarcerated in a federal institution and who was engaged in giving testimony in many courts. As we noted in the prior opinion filed April 21, 1972, Fisher did not demand a specified trial date. There is nothing in the record to show that Fisher suffered any prejudice by way of inability to produce witnesses or otherwise. In fact, one of the strategies employed by his trial counsel was that the memory of the State's witnesses was blurred by the passage of time. Weighing all the factors, we find that the motion to dismiss was properly denied.

Fisher next argues that the trial judge committed reversible error when he refused to allow the jury to take two letters written by McKenney to Joan Janiszewski into the jury room during deliberation. Had McKenney denied or qualified the

contents of the letters, their introduction would have been appropriate. *State v. Smith,* 101 N.J. Super. 10 (App. Div. 1968), certif. den. 53 N.J. 577 (1969). But the letters were disclosed to the jury on cross examination and their content was admitted by McKenney.

Fisher's next argument concerns the trial judge's refusal to allow him to cross-examine McKenney as to psychiatric care which McKenney received in 1968. We find no error. McKenney's psychological state of mind in 1968 was not logically relevant to his credibility while testifying in 1972; *State v. Vigliano,* 50 N.J. 51 (1967) is inapposite. That decision rested upon the prosecutor's concealment of the fact that the State's primary witness had been committed to a hospital *during trial* and found by two examining physicians to be "confused, disoriented and suffering from senility, chronic brain syndrome associated with cerebral arteriosclerosis." *Id.* at 57-58.

Fisher's final argument concerns the propriety of the prosecutor's remarks during summation that the robbery was an inside job based on a tip from the switchboard operator, and his characterization of the defendants as "bums." There was testimony by McKenney that a tip had been given to Fisher by an employee of Great Eastern. Thus, the prosecutor's comment that the robbery was an "inside job" finds support in the evidence adduced.

The comment that the inside tip came from a switchboard operator, while not supported by the record, was harmless. We fail to see any prejudice resulting to Fisher from the prosecutor's comment.

Opinion

The reference to defendants as "bums" during the prosecutor's summation was immediately objected to by Fisher. The court instructed the jury to disregard the comment. Under these circumstances we find no reversible error.

Prior to oral argument defendant Cappadona presented a motion for a new trial based upon allegedly newly discovered evidence to the effect that the State's principal witness, McKenney, had lied when he implicated Cappadona. We initially reserved decision on the motion pending oral argument. However, we have not considered the merits of the motion since, pursuant to the provisions of Rule 3:20-2, it should be presented to the trial court in the first instance. Our decision on the issues presented on the appeal is without prejudice to defendant's right to present such a motion to the trial court.

The judgments of conviction are affirmed.

A TRUE COPY

Elizabeth McLaughlin

APPENDIX 2 — ORDERS OF APPELLATE DIVISION
(Filed April 8, 1974)

ORDER ON
MOTIONS/PETITIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3009-71
MOTION NO. M-1091-73
BEFORE PART D

Judges: Kolovsky
Fritz
Crane

STATE OF NEW JERSEY

VS

FRED CAPPADONA

Moving Papers Filed	March 18, 1974
Answering Papers Filed	
Date Submitted to Court	March 18, 1974
Date Argued	
Date Decided	April 5, 1974

Original filed
April 8, 1974
Mortimer G. Newman, Jr.
Clerk

Orders

This matter having been duly presented to the Court, it is hereby ORDERED as follows:

Petition for REHEARING — Denied x Other x

SUPPLEMENTAL:

The two points argued by defendant in his application for a rehearing are without merit. Insofar as they relate to pretrial discovery and the refusal of the trial court to permit cross-examination of the witness McKenney as to his psychiatric history, the arguments were dealt with and rejected in the opinion filed.

The further assertion, now advanced, that defendant was prejudiced by the alleged failure of the State to disclose that it had a pretrial statement from one Lattimore indicating that defendant Cappadona did not come to his house subsequent to the robbery, is without substance. The record, specifically the affidavit filed by defendant's attorney on his application for a new trial, discloses that he and defendant had that information prior to the trial. He and defendant had visited Lattimore and had then been told of the statement allegedly made by Lattimore to the prosecutor. Defendant having chosen, as a matter of trial strategy, not to call Lattimore as a witness is not now in a position to complain because Lattimore's testimony was not before the jury.

FOR THE COURT:

s/ Harold Kolovsky
P.J.A.D.

Witness, the Honorable HAROLD KOLOVSKY, Presiding Judge of Part D, Superior Court of New Jersey, Appellate Division, this 5th day of April 1974.

s/ Mortimer G. Newman, Jr.
Clerk of the Superior Court

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

s/ Mortimer G. Newman, Jr.
Clerk

APPENDIX 3 — PETITION FOR CERTIFICATION

SUPREME COURT OF NEW JERSEY
SEPTEMBER TERM
C-766 1973

State of New Jersey,

Plaintiff-Respondent,

v.

Fred Cappadona,

Defendant-Petitioner.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 22nd day of July, 1974.

s/ Florence R. Peskoe
Clerk

FILED

Jul 22 1974

s/ Florence R. Peskoe
Clerk